

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1879 of 2005
WITH
CIVIL APPLICATION No. 4147 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

PATINA TRADING CO. PVT.LTD. & 1 - Petitioners
Versus
DIPAKBHAI BABULAL PAREKH SOLE PROPRIETOR OF -
Respondent

Appearance :

MR AS VAKIL for Petitioners.

MR YF MEHTA for Respondent.

CORAM :	HONOURABLE MR.JUSTICE K.A.PUJ
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Date : 13/06/2007
COMMON ORAL JUDGMENT

1. The petitioners - original defendants have filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the judgment and order dated 30.07.2004 passed by the learned Chamber Judge, Court No. 15, City Civil Court, Ahmedabad below application Exh. 11 in Summary Special Suit No. 3702 of 2002 and the consequential decree dated 30.07.2004 and further praying for quashing and setting aside the Execution/Darkhast No. 364/2004 pending in the City Civil Court, Ahmedabad.

2. The petition was admitted and rule was issued on 15.02.2005. The decree passed in Summary Suit No. 3702 of 2002 dated 30.07.2004 was stayed on condition that the petitioners shall deposit Rs.50,000/- with the Trial Court within a period of 30 days from the date of the said order. The amount of Rs.50,000/- was deposited by the petitioners within the time granted by this Court and stay is in

operation till this date.

3. It is the case of the respondent-original plaintiff in the Summary Suit filed before the City Civil Court, Ahmedabad that the petitioners are dealing in manufacturing, distribution and sales of edible sweets, namkeen and other items with different brand names, mainly, Mohan Namkeen and Mohanlal S. Mithaiwala. The petitioner No. 1 had launched the said products in the city of Ahmedabad and the outskirts of Ahmedabad and Gujarat in the year 1999. For the purpose of enhanced sales and wide publicity of its products, the petitioner No. 1 had approached the respondent-plaintiff for advertising the said products through public and dealer wall paintings. The terms and conditions between the petitioner No. 1 and the respondent-plaintiff were settled. The petitioner No. 1 has paid a sum of Rs.15,000/- initially to the respondent-plaintiff. The respondent-plaintiff has accordingly carried out the contract work at various places/walls/sites.

4. The respondent-plaintiff thereafter raised on the petitioner Nos. 1, 23 invoices, for a total sum of Rs.3,51,676/-. The first invoice was dated 30.08.1999 and the last invoice was dated 17.09.1999. Under the said invoices, 18% interest was chargeable on amounts remaining unpaid after due date, legal proceeding by or against was required to be instituted in Ahmedabad only and the payments were required to be made within five days. The petitioner No. 1 has paid a further amount of Rs.85,000/- to the respondent-plaintiff on 1.11.1999 and thus, according to the respondent-plaintiff, a total sum of Rs. 1 Lac was paid by the petitioner No.1 to the respondent-plaintiff.

5. It is the case of the petitioners-defendants that the respondent-plaintiff addressed a letter dated 12.02.2000 wherein the respondent-plaintiff has admitted that the respondent-plaintiff has done more work than was agreed between the parties. The said letter dated 12.02.2000 clearly admits that the

additional work done was of 50,000 Sq. Ft. (the value of which would be approximately Rs. 2 Lacs, because the alleged agreed rate was Rs. 4 per Sq. Ft. of wall painting). However, the said letter dated 12.02.2000 together with its enclosures were not produced and/or referred to by the respondent-plaintiff in the suit. Thereafter, the respondent-plaintiff issued a notice dated 30.06.2000 to the petitioner No.1 at Mumbai through its Advocate and called upon the petitioner No. 1 to pay a sum of Rs.2,51,676/- within seven days from the date of receipt thereof. Thereafter the petitioner No. 1 through its advocate issued a reply dated 06.07.2000 to the said notice dated 30.06.2000 and denied the contents of the said notice and also called upon the respondent-plaintiff to supply to the petitioner No. 1 and/or its Advocate the copy of the Contract referred to in the said notice dated 30.06.2000. The respondent-plaintiff did not respond. All the three letters have not been referred to in the plaint and/or produced along with the plaint.

6. It is also the case of the petitioners that the respondent-plaintiff has filed a complaint with the Police Sub-Inspector, Maninagar Police Station, Ahmedabad in or around January 2001. The Criminal Investigation Department has, vide its communication dated 14.04.2001 informed the petitioner No. 1 at Mumbai about the same. The respondent-plaintiff has also not made any reference to the said criminal complaint/case either in the plaint or has not produced any documents in that behalf along with the plaint. The respondent-plaintiff thereafter on 18.10.2002 filed the suit against the petitioners before the Trial Court and prayed for a decree for an aggregate sum of Rs.3,93,333.84ps. which comprises of Rs.2,51,676/- towards the principal amount and Rs.1,41,658.74ps. towards interest, with further interest @ 18% p.a. Along with the said suit, the plaintiff filed/produced several documents as per the list of the documents. In the cause title of the plaint, it is stated that the process/summons of the petitioner No. 1 be served upon the petitioner No.2.

7. It is also the case of the petitioners that from the Rojnama, it appears that the Trial Court ordered issuance of summary summons upon the petitioners on 18.10.2002. Again on 08.01.2003, the Rojnama indicates that the summons upon the petitioners/defendants had returned unserved and hence, fresh summons were ordered to be reissued. Thereafter, the respondent-plaintiff did not pay the process fee for a long time. By an order dated 24.03.2003, fresh summons were reissued against the petitioners-defendants. The Rojnama indicates that on 15.07.2003, fresh summons had also returned unserved and again the Trial Court had issued fresh summons upon the petitioners / defendants on 24.09.2003. The Rojnama indicates that the fresh summons also returned unserved and were ordered to be reissued. On 13.11.2003, the Rojnama again indicates that fresh summons returned unserved and were once again ordered to be reissued. On 18.12.2003, as fresh summons had returned unserved, the Trial Court once again

ordered issuance of Summons. Similar endorsements were made in the Rojnama on 23.01.2004, 05.02.2004, 01.03.2004 and 15.03.2004. Thereafter, it appears that on 6.04.2004, the respondent-plaintiff gave an application Exh.10 to serve the summons upon the petitioners by Regd. Post Acknowledgment Due which came to be granted by the Trial Court. The Rojnama indicates that on 23.06.2004, the Regd. Post Acknowledgment Due had returned duly served against the petitioner Nos. 1 & 2 with the endorsement "refused".

8. It is also the case of the petitioners that at no point of time, the respondent-plaintiff has ever attempted to serve the summons of the suit upon the petitioner No. 1 at Mumbai. The summons were always sought to be served upon the petitioner No. 2 at the address mentioned in the cause title. At the address of the petitioner No. 2 mentioned in the cause title, there is only one employee who is not authorised to accept the Summons etc. either on behalf of the petitioner No. 1 Company or the petitioner No.2. Even after

having come to know that the said employee is not authorised to accept service of summons, the respondent-plaintiff never attempted to serve the same at Mumbai.

9. It is also the case of the petitioners that on 20.07.2004, the respondent-plaintiff filed an application Exh. 11 purporting to be an application under Order 37, Rule 2 of the Civil Procedure Code and stated in para 11 thereof that the respondent-plaintiff has sent the process/summons through Regd. Post Acknowledgment Due, and as per the endorsement, the petitioners have refused to accept the process/summons on 19.04.2004 and accordingly, the petitioners have not filed their appearance in the suit and consequently praying for a decree in favour of the respondent-plaintiff. The Trial Court, vide impugned order dated 30.07.2004 passed below Exh. 11 has observed that the petitioners have been validly served and that the petitioners have not filed any appearance and thereby proceeded to pass an order decreeing the

suit. The respondent-plaintiff has never even thereafter at any point of time informed the petitioners and/or communicated to the petitioners the order dated 30.07.2004.

10. It is also the case of the petitioners that on the basis of the order dated 30.07.2004, the Trial Court has drawn the decree and on the basis of the said judgment and decree dated 30.07.2004, the respondent-plaintiff filed Execution proceedings vide Darkhast No.364 of 2004 on or around 29.12.2004. In the said Darkhast, the Trial Court appears to have passed an order of attachment on 11.01.2005. The Bailiff of the Trial Court thereafter came at the address of the petitioner No.2 at Ahmedabad and attached/removed the various movables valued at approximately Rs.37,000/- on 19.01.2005. It is then only the employee of the petitioner No. 1 learnt about the suit and the execution proceedings. The said employee thereafter informed the petitioner No. 2 at Mumbai where he ordinarily resides, about the same. Thereafter the petitioner No. 2 got in touch

with his advocates at Mumbai, who advised him to approach the advocates at Ahmedabad to take further/appropriate steps in the matter.

11. Being aggrieved and dissatisfied with the impugned judgment and order dated 30.07.2004 and the decree dated 30.07.2004 passed by the Trial Court in the suit and being aggrieved by the execution proceedings/Darkhast No. 364 of 2004, the petitioners have approached this Court by way of this petition under Article 227 of the Constitution of India.

12. Mr. A.S. Vakil, learned advocate appears for the petitioners. Before he makes his submissions, the Court raised an issue regarding maintainability of the petition. Even in the affidavit-in-reply filed by the respondent, the same issue regarding maintainability of the petition is raised. Appropos to the query raised by the Court, Mr. Vakil has raised the contention that the petition has been admitted on 15.02.2005 and once the petition has been admitted,

the same cannot be dismissed on the ground of non-maintainability. To make good this submission, Mr. Vakil has relied on the decision of the Hon'ble Supreme Court in the case of **Durga Enterprises (P) Ltd. And another V/s. Principal, Secretary Govt. of U.P. And others, (2004) 13 SCC 665** wherein it is held that the High Court, having entertained the writ petition which was pending for a long period of 13 years and in which pleadings were also completed, ought to have decided the case on merits instead of relegating the parties to a Civil Suit.

13.Mr. Vakil has further relied on the decision of this Court in the case of **D. I. D. Franchisees' Association (Gujarat) V/s. Chief General Manager, Gujarat Telecom Circle (B.S.N.L. Corpn.) & Ors., (2004) 45(3) GLR 2609** wherein it is held that the learned counsel for the petitioners is justified in contending that the petitioners have approached this Court since they have no remedy

under Section 14 of the Telecom Regulatory Authority of India Act, 1997. Therefore, the petitioners are heard on merits as the same cannot be dismissed after a lapse of four years on the ground of other alternative remedy and also in view of the fact that they cannot approach the Tribunal since the license is issued under Section 4 (2) of the Act.

14.Mr. Vakil has further relied on the decision of this Court in the case of **Chauhan Dhulsinh Chatursinh V/s. District Superintendent of Police, Sabarkantha and others, (2002) 43 (3) GLR 2626** wherein while dealing with the contention raised by the learned A.G.P. with regard to maintainability of the petition, in view of the fact that there is alternative equally efficacious remedy available to the petitioner, the Court's attention was drawn to Section 27 of the Bombay Police Act and Rule 9 of the Bombay Police (Punishment and Appeal) Rules, wherein appeal against the orders

like the one under challenge is provided for. Though prima facie the contention appears to be well founded, the Court is not inclined to accept it because of the fact that the petition has been admitted way back on 30.07.1992 and now it has reached to the stage of final disposal and it will not be proper to dispose of the same on such technical ground. The Court further observed that had this objection been taken at the stage of preliminary hearing, it would have been of some meaning. However, at such a belated stage, if the petition is thrown out on such ground, the petitioner will be rendered remediless as the period for filing appeal under aforesaid provision by now must have expired long back. It is, therefore, most desirable to dispose of this petition on its merits.

15.Mr. Vakil has further relied on the decision of this Court in the case of **Tata Chemicals Limited V/s. Adityana Nagar Panchayat, (2001) 42 (2) G.L.R. 1538** wherein it is held that whenever at the

admission stage, the Court finds that the alternative remedy is available, the petition at the threshold should be dismissed, directing the petitioner to resort to the other efficacious remedy available in law, but if the petition is admitted and the rule is issued, and thereafter, considerable time is passed, and the petition is heard on merits, the Court should not dismiss the petition only on the ground that other efficacious remedy when available ought to have been resorted to. The Court may also add that in the cases where appeal against the other challenge though permissible in law, as an efficacious remedy, the decision in appeal, however, is not going to set every question or dispute at rest and keep the same burning, meaning thereby doing complete justice is not possible, it would not be just and proper to direct the petitioner to resort to other alternative remedy available in the law.

16.Mr. Vakil has further relied on the decision of this Court in the case of **Madhusudan Dharshibhai**

Tank V/s. M. Anwar, (2000) 41 (3) G.L.R. 2403

wherein it is held that as such, this Court is fully justified to entertain this petition wherein the principle of natural justice has been violated. Moreover, the petition has been admitted in the year 1988. It is not proper for this Court to relegate the petitioner to avail of alternative remedy of appeal after twelve years, the matter can be decided on merits of the case. Thirdly, judicial trend of today is to shorten the litigations and decide in accordance with law and not to leave for further litigation. Thus, the objection raised by the learned Counsel for the respondent is not sustainable in the eye of law.

17.Mr. Vakil has further relied on the decision of this Court in the case of **Dahyabhai Devjibhai Vasava V/s. Dy. District Development Officer (Rev.) Broach, (1979) 20 (2) G.L.R. 678** wherein it is held that not as a mandate of law (because of Article 226 (3) of the Constitution of India as was there in the year 1976 having been deleted), but as a matter

of self-imposed rule of procedure developed by this Court and the Supreme Court, the prerogative writ jurisdiction is not entertained when the litigant has not exhausted alternative remedies and particularly the remedies like an appeal under some law. This question, however, was prominently before this Court, when the matter was at the admissional stage. Despite this point having been urged, this Court admitted the matter. This would mean that the petitioner was led into the belief that this Court was not insistent on that normal rule of exhausting alternative remedy before approaching this Court and that it would be too late in the day for the Court now to reject this petition, after more than 3 and ½ years of its life in this Court. Because of this Court's action in admitting the matter, the petitioner has lost that chance of preferring appeal.

18. Apart from the above authorities cited by Mr. Vakil, in support of his submission that once the petition is admitted, it cannot be thrown over board on the ground that an alternative remedy is available to the

petitioner, Mr. Vakil has further made a submission that despite there being an alternative efficacious remedy available to the litigant, the petition may not be dismissed on that ground especially when order under challenge is violative of any fundamental rights or it is in excess of jurisdiction or without jurisdiction or it is in violation of the principles of natural justice. In such cases, it is immaterial as to whether petition is originally admitted or not. The Court should decide the petition on its own merits. In support of this submission, Mr. Vakil relied on the decision of the Hon'ble Supreme Court in the case of **Himmatlal Harilal Mehta V/s. State of Madhya Pradesh and others, AIR 1954 S.C. 403** wherein it is held that the contention that because a remedy under the impugned Act is available to the assessee, he is disentitled to relief under Art. 226 stands negatived by the decision in *AIR 1953 SC 252 of this Court in the State of Bombay V/s. The United Motors (India) Limited*. The principle that a Court will not issue a prerogative writ when an adequate

alternative remedy was available does not apply where a party has come to the Court with an allegation that his fundamental right had been infringed and sought relief under Art. 226. Moreover, since the remedy provided by the C.P. And Berar Sales Tax Act is of an onerous and burdensome character and before the assessee can avail of it he has to deposit the whole amount of the tax, such a provision can hardly be described as an adequate alternative remedy.

19.Mr. Vakil further relied on the decision of the Hon'ble Supreme Court in the case of **State of U.P. V/s. Mohammad Nooh, AIR 1958 S.C. 86** wherein it is held that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. Provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be

taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law. The superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction. The Court further held that if therefore, the existence of other adequate legal remedies is not per se a bar to the issue of a writ of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicial or quasi judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior court can in a

proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal, e.g. by furnishing security required by the statute, it cannot then be laid down as an inflexible rule of law that the superior court must deny the writ when an inferior court or tribunal by discarding all principles of natural justice and all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior court or tribunal on appeal or revision.

20.Mr. Vakil has further relied on the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of **A. V. Venkateswaran, Collector of Customs, Bombay, V/s. Ramchand Sobhraj Wadhwani and another, AIR 1961 SUPREME COURT 1506** wherein it is held that the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the

court, have exhausted other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which courts have laid down for the exercise of their discretion. The Court further held that the wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Art. 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of

an alternative remedy. The broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court. The Court further held that if the petitioner has disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot certainly be permitted to urge that as a ground for the court dealing with his petition under Art. 226 to exercise its discretion in his favour.

21.Mr. Vakil has further relied on the decision of the Hon'ble Supreme Court in the case of **M. G. Abrol, Additional Collector of Customs, Bombay and**

another V/s. M/s. Shantilal Chhotelal and Co., AIR 1966 SUPREME COURT 197 wherein while dealing with the contention that the High Court should not have exercised its jurisdiction under Article 226 of the Constitution of India, as the respondents had an effective remedy by way of an appeal to higher Customs Authorities, the Hon'ble Supreme Court has held that the High Court rightly pointed out that the respondents had no effective remedy, for they could not file an appeal without depositing as a condition precedent the large amount of penalty imposed on them. That apart, the existence of an effective remedy does not oust the jurisdiction of the High Court, but it is only one of the circumstances that the Court should take into consideration in exercising its discretionary jurisdiction under Art. 226 of the Constitution.

22.Mr. Vakil has further relied on the decision of the Hon'ble Supreme Court in the case of **L. Hirday Narain V/s. Income-Tax Officer, Bareilly, AIR**

1971 SUPREME COURT 33 wherein, a point at issue was that an order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. On these facts, the Hon'ble Supreme Court has held that the Court is unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

23.Mr. Vakil has further relied on the decision of the

Hon'ble Supreme Court in the case of **Whirlpool Corporation V/s. Registrar of Trade Marks, Mumbai and others, (1998) 8 S.C.C. 1** wherein it is held that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Therefore, the jurisdiction of the High

Court in entertaining a writ petition under Article 226 of the Constitution, inspite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

24.Mr. Vakil has further relied on the decision of the Hon'ble Supreme Court in the case of **State of H.P. and others V/s. Gujarat Ambuja Cement Limited and another, (2005) 6 S.C.C. 499** wherein it is held that there are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no

application when the impugned order has been made in violation of the principles of natural justice. Moreover, where the proceedings itself are an abuse of process of law, the High Court in an appropriate case can entertain a writ petition. The Court further held that where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess, these can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute.

25.Mr. Vakil has further relied on the decision of the Hon'ble Supreme Court in the case of **L. K. Verma**

V/s. HMT Ltd. And another, (2006) 2 S.C.C. 269

wherein it is held that the High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite the existence of an alternative remedy, a writ Court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the Court or the Tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been violation of a principle of natural justice or where vires of the Act is in question. The Court further held that in any event, once a writ petition has been entertained and determined on merit of the matter, the appellate court, except in rare cases, would not interfere therewith only on the ground of existence of alternative remedy.

26. Based on the aforesaid plethora of decisions, Mr.

Vakil has strongly urged before the Court that the petition cannot be thrown overboard on the ground that the petitioner has an alternative remedy to approach to the Civil Court by filing an application under Order 37, Rule 4 of CPC for setting aside of the decree or to file first appeal before this Court under Section 96 of the Civil Procedure Code. He has, therefore, submitted that the present petition will have to be heard on merits.

27. Mr. Vakil has further submitted that even otherwise, the petitioners' case falls within the parameters laid down in the aforesaid decisions as one of the circumstances which is present in the present case is that the impugned judgment and decree passed by the City Civil Court is in violation of the principles of natural justice. The petitioners have not been served with the Summons / Notice of the suit and the decree was passed ex-parte. In so far as the petitioner No. 1 is concerned, it is the Company incorporated under the provisions of the Companies Act, 1956 and is a Corporation as understood under Order 29 of the

Civil Procedure Code. Service of summons, notices and other judicial processes, upon a defendant is governed by the provisions of Order 37, Rule 3 (2). The plaint does not contain an averment that the address given by the petitioner No. 1 for effecting service is address of the petitioner No. 2 stated in the cause title. Even otherwise, the petitioner No. 1 has never given the said address to the respondent-plaintiff for service. Further, the respondent-plaintiff has stated in the cause title that the process/summons of the petitioner No. 1 be served upon the petitioner No. 2. On a mere perusal of the rojnama and/or bailiff's endorsement, at no point of time the process/summons have in fact been served upon the petitioner No.2, but was sought to be served upon an employee of the petitioner No. 2 who was never authorised to accept the service of process/summons. The said employee was admittedly not sought to be served at the registered office of the petitioner No. 1 situated at Mumbai but was sought to be served at the address, purporting to be the address of the petitioner No. 2 at Ahmedabad.

Further, all along, from 18.10.2002 upto 06.04.2004, fresh summons were being issued on the basis that the same are being returned unserved. Some of the endorsements of the bailiff state that 'employee' is refusing to accept the summons. The same did not constitute good service and, therefore, the respondent-plaintiff applied vide Exh. 10, for service of summons, by Regd. Post A.D. However, when the Summons/Process sought to be served by Regd. Post A.D., also returned unserved with the postal endorsement 'Refused', the same was treated as "good service" and on that basis, the impugned order dated 30.07.2004 came to be passed below respondent-plaintiff's application Exh. 11. He has, therefore, submitted that the petitioner No. 1 was in fact never served at all, either in the manner contemplated by Order XXIX Rule 2 or Order XXXVII Rule 3 (2) of the C.P.C.

28. In support of his submission, he relied on the decision of the Hon'ble Supreme Court in the case of

M/s. Shalimar Rope Works Ltd. V/s. M/s. Abdul Hussain H. M. Hasan Bhai Rassiwala and others, AIR 1980 SUPREME COURT 1163

wherein it is held that the meaning of Clause (b) of O.29, R.2 has got to be understood in the background of the provisions of Order 5 which is meant for issue and service of summons on natural persons. Sending a summons by post to the registered office of the company, unless the contrary is shown, will be presumed to be service on the company itself. But the first part of clause (b) has got to be understood with reference to the other provisions of the code. The Court further held that the words "leaving the summons at the registered office" under Cl. (b) do not mean that the summons can be left anywhere uncared for in the registered office of the company. These words have to be read in the background of the provision contained in Order 5, Rule 17 of the Code. In other words. if the serving peon or bailiff is not able to serve the summons on the Secretary or any Director or any

other Principal Officer of the Corporation because either he refuses to sign the summons or is not to be found by the serving person even after due diligence then he can leave the summons at the registered office of the company and make a report to that effect. In the case before the Hon'ble Supreme Court, the summons was served on the employee sitting in the registered office of the company. The said employee was mere office Assistant in the Sales Department of the company and was not an officer duly authorised to accept summons on behalf of the company. It was not the case of the plaintiff that the service of the summons was effected in accordance with the first part of Cl.(b) of R.2 of O.29. Nowhere a stand was taken that the summons was duly served on the company because it was "left at the registered office of the company. On these facts, it was held by the Hon'ble Supreme Court that there was not valid service of summons on the company. The judgment of the trial Court setting aside the ex-parte decree under O.9, R.13 was correct. No error of jurisdiction was committed by it. The High Court went wrong in

interfering with it.

29. In so far as petitioner No. 2 is concerned, Mr. Vakil has submitted that the petitioner No. 2 resides at Mumbai and ordinarily carries on business at Mumbai. The petitioner No. 2 has never authorised any employee to accept service of any Court process/summons. The petitioner No. 2 has also not required the respondent-plaintiff as per Order 37, Rule 3 (2) to serve process at the address mentioned in the cause title. For all the aforesaid reasons, the petitioner No. 2 was also never duly served in the suit. He has, therefore, submitted that the impugned order dated 30.07.2004 consequential decree and the execution proceedings are liable to be quashed and set aside on this ground alone.

30. Mr. Vakil has further submitted that the suit against the petitioner No. 2 is not maintainable. The alleged contract of the respondent-plaintiff is with the petitioner No. 1 only. The petitioner No. 2 is admittedly sued in his capacity as Director of the

petitioner No.1. The Director cannot be personally liable for the dues of the Company. Even the notice dated 30.06.2000 issued by the respondent-plaintiff's advocate, was issued only to the petitioner No.1, clearly suggesting that there is no privity of contract between the respondent-plaintiff and the petitioner No.2. The petitioner No. 2, therefore, is neither a necessary nor a proper party to the suit. The Trial Court has completely erred in not examining the suit, the nature of the transaction, etc. from this perspective, before passing the impugned order dated 30.07.2004 below application Exh. 11. He has, therefore, submitted that the suit against the petitioner No. 2 is liable to be dismissed with costs.

31.Mr. Vakil has further submitted that the suit is based on an oral contract. The respondent-plaintiff claims to have settled the terms and conditions with the petitioner No. 1. The respondent-plaintiff has not produced any written contract/agreement. The respondent-plaintiff has also not specified the agreed terms and conditions, when and where the same

were allegedly agreed and finalised, who represented the petitioner No.1 and negotiated the same, etc. Further, the respondent-plaintiff has also not provided particulars of his alleged demands and reminders for payments, allegedly made upon the petitioners. Further, the respondent-plaintiff has alleged, in paragraph 6 of the plaint that the conduct of the petitioners is fraudulent. Allegations of fraud are required to be proved and the Trial Court ought not to have summarily decreed the suit on the basis of such allegations.

32.Mr. Vakil has lastly submitted that the petitioners had sufficient cause for not appearing in the suit, much less within 10 days of any service (as contemplated under Rule 142 (2) of the Ahmedabad City Civil Court Rules, 1961. Any procedure/steps contemplated subsequent to entering appearance, under Rule 142 (2), are therefore not attracted in the facts of the present case. As the petitioners had no occasion to enter appearance, the petitioners had no occasion to obtain leave from the Judge/Trial Court

to defend the suit – as contemplated under Rule 142 (3) of the City Court Rules. He has, therefore, submitted that the application Exh. 11 of the respondent-plaintiff does not meet with requirements of of Rule 142 (3) of the City Court Rules and hence, the execution proceedings commenced pursuant to the decree dated 30.07.2004 are consequently liable to be quashed and set aside.

33. On the basis of the aforesaid submissions and law as well as on facts and reported authorities cited before the Court, Mr. Vakil has strongly submitted that the petitioners did not have any alternative remedy, much less an equally efficacious alternative remedy available under Order 37, Rule 4 as the said remedy appears to be barred by limitation and the said remedy does not confer upon the trial Court to grant unconditional leave to the petitioners to appear and defend the suit. In any view of the matter, the purported remedy under Order 37, Rule 4 of the C.P.C. cannot and does not prevent this Court from

exercising its writ jurisdiction as well as supervisory jurisdiction under Article 226/227 of the Constitution of India.

34.Mr. Y. F. Mehta, learned advocate appearing for the respondent, on the other hand, has vehemently submitted that the present petition is not maintainable. Once the Civil Court passes a decree, no petition under Articles 226 or 227 is maintainable. He has further submitted that the petitioners, if at all, have any remedy that is available only under the Code of Civil Procedure. The petitioners may file an application for setting aside the decree and/or they file regular First Appeal provided under Section 96 of the Civil Procedure Code. The requisite Court Fees will be required to be paid for filing the first appeal, and as per the provisions contained in the Code of Civil Procedure, the petitioners will be required to deposit full amount of decree with cost and interest and they would also have to pay Court Fees for the same. He has further submitted that against the conditions for

stay and the procedure prescribed by the statute, no recourse could be had by any remedy under Article 226 or 227 of the Constitution of India. He has, therefore, submitted that when an alternative efficacious remedy is available and approved, extraordinary jurisdiction under Article 226 & 227 cannot be resorted to. The petition filed by the petitioners is against the order passed by the lower Court and when appellate and other remedies are provided, petition is not maintainable.

35. In support of his submissions, Mr. Mehta relied on the decision of the Hon'ble Supreme Court in the case of **Sadhana Lodh V/s. National Insurance Co. Ltd. and another, AIR 2003 SUPREME COURT 1561** wherein it is held that the right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Art. 226/227 of the Constitution on the premises that the insurer has

limited grounds available for challenging the award given by the Tribunal. S. 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under S. 149(2) of the Act. The Court further held that where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Art. 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under S. 115 of the C.P.C. Where remedy for filing a revision before the High Court under S. 115 of CPC has been expressly barred by a State Government, only in such case a petition under Art. 227 of the Constitution would lie and not under Art. 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been

rejected, and a State enactment has barred the remedy of filing revision under S. 115, CPC, in such a situation a writ petition under Art. 227 would lie and not under Art. 226 of the Constitution. Thus where the State legislature has barred a remedy of filing a revision petition before the High Court under S. 115, C.P.C., no petition under Art. 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Art. 226 of the Constitution. The Court further held that the supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Art. 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Art. 227 of the Constitution to review or re-weigh the

evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision.

36.Mr. Mehta has, therefore, submitted that though the petition has purportedly been filed under Articles 226 & 227 of the Constitution of India, it is absolutely a petition under Article 227 of the Constitution of India and this is not a case where the supervisory jurisdiction of this Court should be exercised.

37.With regard to the merits of the matter, Mr. Mehta has submitted that the contention raised as to the service of summons, cannot be dealt with by this Court in the petition. The appropriate remedy is already provided in the Code of Civil Procedure for the same. The factual dispute as to the service of summons, on a company or an employee of the Company, cannot be decided in the petition. He has further submitted that it is clear from the various assertion made in paragraph 3.1 of the petition that

petitioners have tried to overtake the process of the Court, and have consistently secured that, summons sent to them are returned unserved. Various efforts made by the respondent-plaintiff go to show that the petitioners-defendants were very much aware of the proceedings and so as to defeat the rightful claim of the respondent-plaintiff all out efforts were made, to see that the payment of the plaintiff is obstructed. When the summons was sent by Regd. Post and it returns with the endorsement of refused, there is a presumption that the persons at the address have refused to accept the post. The view taken by the Trial Court is, therefore, legal and valid and same requires no interference by this Court under extraordinary jurisdiction by recourse to Articles 226 & 227 of the Constitution of India.

38.Mr. Mehta has further submitted that once decree is passed and execution proceedings are taken up, a challenge to the decree is out of question. The petitioners-defendants were duly served and the Trial Court has rightly satisfied itself as to the

service of summons to the petitioners-defendants. The conclusion of the Trial Court as to the due service of summons to the defendants cannot be questioned in the petition filed under Articles 226 & 227 of the Constitution of India. He has, therefore, submitted that the petition filed by the present petitioners is totally misconceived and it is required to be dismissed with costs.

39. After having heard learned advocates appearing for the respective parties and after having gone through the memo of petition, affidavit-in-reply and the impugned judgment, the Court is of the view that there is no dispute about the proposition that the High Court has an ample power and discretion to entertain the petition filed under Articles 226 & 227 of the Constitution of India despite the fact that there is an alternative efficacious remedy available to the petitioner. There is also not much dispute about the proposition that once the petition has been admitted and couple of years have been passed after the admission order, it is not just and proper to

throw the petition over board without considering the merits of the petition. However, all these propositions are not absolute in nature. They are to be considered only with regard to the facts and circumstances of a given case. The Court has to apply the settled propositions of law and celebrated principles laid down by the Courts considering the facts of the case and also taking into consideration the equity, just and fair play as ultimately the Court is exercising its discretionary and equitable writ jurisdiction.

40. Here in the present case, the petition was admitted and rule was issued at the very first hearing on 15.02.2005. It is true that the admission of the petition is a matter between the Court and the petitioner. However, when the question of maintainability of the petition is involved and if it is admitted ex-parte, the other side cannot be restrained from raising a dispute about the maintainability of the petition. It is very unfortunate that for paucity of time, the petition could not be

heard finally till this date. However, the period of two years is too short to take a view that the question of maintainability cannot be now gone into at this final hearing stage. The Court is, therefore, of the view that all these decisions which have been cited before the Court wherein the petitions have been admitted after by-parte hearing and the time gap between the admission and the final hearing is of number of years, varying from 5 years to 15 years, have no application to the facts of the present case.

41.If the various parameters laid down by the Courts from time to time for the purpose of exercising of extra ordinary writ jurisdiction under Articles 226 & 227 of the Constitution of India by this Court despite the fact that an alternative efficacious remedy is available are concerned, it is not the case of the petitioners that the City Civil Court has no jurisdiction to pass a decree or to initiate execution proceedings against the petitioners. It is also not the case of the petitioners that there was any violation of the fundamental rights. The petitioners

have also not challenged any vires of the provisions contained in any statute or the Civil Procedure Code. The entire case of the petitioners is based while moving this petition before this Court under Articles 226 & 227 of the Constitution of India is that the petitioners have not been properly served and they have no opportunity to file their appearance and defend the suit and hence, the impugned judgment and decree passed by the City Civil Court as well as the execution proceedings initiated by the Court pursuant to the said decree are in violation of the principles of natural justice. It is, therefore, urged that one of the parameters for entertaining the petition under Articles 226 & 227 of the Constitution of India is satisfied and hence, inspite of the fact that there being an alternative efficacious remedy available to the petitioners, the petition should be entertained and allowed. If this contention raised by the petitioners is minutely examined, it becomes clear that the transactions are of 1999. The work undertaken by the respondent-plaintiff was to be performed in the State of Gujarat and even as per

the letter dated 12.02.2000 on which heavy reliance was placed by the petitioners, clearly reveals that the work was entrusted by the Ahmedabad office of the petitioner No.1 Company and maps containing the Rules and places etc. and detailed list for doing the painting work on the walls, restaurants etc. were provided by the Ahmedabad office. This address of the Ahmedabad office was also provided by the petitioners. The work was carried out by the petitioners in the year 1999 and full payment thereof was not received by the respondent and therefore, he has filed a suit in 2002. Several attempts were made by the respondent to effect the service of summons and notices, of course at Ahmedabad office. It is not the case of the petitioners that the Ahmedabad office remained closed and there is no one to accept the service of summons. The employee of the petitioner No. 2 was posted at Ahmedabad office and almost on all occasions, when the Bailiff has gone to serve the Summons/notice of the suit, the same was not accepted and the Bailiff has made the endorsement that the summons could not be

served. It is practically impossible to believe that whosoever may be the employee at Ahmedabad office, he has not informed to the petitioners that the suit has been filed by the respondent-plaintiff. The petitioners were, therefore, presumed to have knowledge about the filing of the suit against them. Despite this fact, they have waited for the outcome, not filed appearance till the decree is passed and even when the execution petition was filed and movables at Ahmedabad office were sought to be attached, the petitioners have come to this Court and raised all these issues in a petition filed under Articles 226 & 227 of the Constitution of India. On these facts, the question before the Court is as to whether the Court has to exercise its discretionary and equitable jurisdiction under Articles 226 & 227 of the Constitution of India. These are all disputed questions of facts which require leading of evidence. Had there been a first appeal before this Court under Section 96 of the C.P.C., the Court would have gone into these questions. In this petition, these questions cannot be gone into and hence, the Court

does not think it just and proper to exercise its discretion and also restrains itself from expressing any opinion on these issues.

42.It is true that the petitioner No. 2 cannot personally be held liable for the dues of the Company simply because he is Director of that Company. It is, however, clear that he is the main person through whom the work was entrusted to the respondent-plaintiff and all talks, negotiations etc. appear to have been entered into between the petitioner No.2 and the respondent-plaintiff and it is only because of these fact, he has been impleaded as party in the suit. The petitioner No.2 could have certainly approached the City Civil Court for setting aside the decree or in any case, he could have filed First Appeal under Section 96 of the Civil Procedure Code. Since the Court is not entertaining the petition, it is not just and proper for the Court to go into the merits of the matter or to express any opinion on the issues involved.

43. In view of the above discussion, the Court dismisses this petition only on the ground that it is not maintainable, leaving all issues open for the petitioners to agitate the same before the appropriate Forum. The petition is, therefore, dismissed as not maintainable. Rule discharged.

44. As far as interim relief is concerned, the same is continued till this date. Mr. Vakil has requested the Court to extend the same so as to enable the petitioners to take recourse to the legal remedies available to the petitioners. Having regard to the facts and circumstances of the case, the interim relief granted by this Court and which is in operation till this date is further extended for the period of five weeks from today so as to enable the petitioners to challenge the order before the Hon'ble Supreme Court or even to take recourse by filing an application under Order 37, Rule 4 of the C.P.C. for setting aside an alleged ex-parte decree or even to file First Appeal under Section 96 of the C.P.C. before this Court after making necessary prayers for

condonation of delay.

45. In view of the dismissal of the petition, Civil Application No. 4147 of 2005 does not survive and it is accordingly rejected. Rule discharged.

Sd/-
[K. A. PUJ, J.]

Savariya